No. 80-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES COLE,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the
State of Louisiana

BRIEF ON BEHALF OF THE STATE OF LOUISIANA IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the death of the sole eyewitness (prior to relator's arraignment) to crime by relator, which death was caused by the relator, constitutes *prejudice* to the relator. *Barker vs. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

II. Whether relator was denied his right to a speedy trial. Sixth Amendment to United States Constitution; *Barker vs. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *U.S. vs. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468 (1971).

PARTIES

Relator Charles Cole, indicted for aggravated battery on Billy Ray Crain in violation of LSA-R.S. 14:34 and who has been subsequently charged with manslaughter of the sole eyewitness to the aggravated battery, Johnny Fitzmorris, and Respondent State of Louisiana were the only parties to this case in the courts below.

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OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported as *State vs. Cole*, 384 So.2d 374 (La. 1980). The text of the opinion is correctly set out in the relator's appendix to his application, page 24a.

STATEMENT OF THE CASE

Charles Cole, relator herein, allegedly committed a battery with a dangerous weapon, to wit: a baseball bat, upon Billy Ray Crain, on September 9, 1975. The trial court and Louisiana State Supreme Court denied his Motion to Quash, rejecting relator's claim of denial of right to a speedy trial. Relator had advanced the argument that because Johnny Fitzmorris, the alleged sole eyewitness to the alleged aggravated battery died prior to arraignment, he was prejudiced. This same relator has been charged (though not yet tried) for the manslaughter death of this same alleged eyewitness, Johnny Fitzmorris. Fitzmorris died in May, 1979.

The chronology of pertinent events is as follows:

September 9, 1975 ..	Relator committed crime of aggravated battery.
November 6, 1977 ..	Relator ("picked up") investigated for crime of aggravated battery.
February 21, 1978 ..	Relator indicted for aggravated battery.
May, 1979	Eyewitness to aggravated battery killed.
June, 1979	Relator indicted for manslaughter of eyewitness (separate case).

July 31, 1979 ..... Relator arraigned for aggravated battery.

Aug. 27, 1979 ..... Trial continued at request of relator.

Nov. 8, 1979 ..... Relator filed Motion to Quash on grounds of denial of speedy trial.

Nov. 12, 1979 ..... Trial continued at request of relator.

Jan. 8, 1980 ..... Hearing on Motion to Quash.

Jan. 14, 1980 ..... Trial continued pending writ application.

Feb. 21, 1980 ..... Writ granted in La. Supreme Court.

May 19, 1980 ..... La. Supreme Court opinion, *State vs. Cole,* 384 So.2d 374 (1980) affirming no denial of speedy trial.

June 23, 1980 ..... Rehearing denied by La. Supreme Court.

Aug. 15, 1980 ..... Relator's Application for Writ to U.S. Supreme Court.

REASONS FOR DENYING THE APPLICATION FOR WRIT

There Is No Prejudice To Relator Where Death Of Witness Was Caused By The Relator.

The pertinent balancing advanced by this Court in *Barker vs. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) in the instant case is whether or not there was a substantial prejudice to the accused by his loss (caused by the death of) the alleged sole eyewitness, Johnny Fitzmorris. Inasmuch as the Relator has been charged with the killing of Johnny Fitzmorris (though not yet tried), as revealed at the hearing on the Motion to Quash, the Respondent, State of Louisiana, submits the Relator cannot claim prejudice where Fitzmorris' death is attributable to the Relator. *Hill vs. Wainwright*, 617 F.2d 375, 378 (CA5, 1980).

In the dialect it is called "chutzpah," when the defendant before the bar begs for mercy as an orphan after being charged with killing his mother and father.

Time Delays Justified.

As to the time allegations of excessive limitations of time regarding institution of prosecution and commencement of trial, the State submits there is no question in the instant case of timely filing by the State. The Relator simply raises the issue of the "length of time"

stated in the statutes. Yet he shows no prejudice by the length of time involved. The only prejudice he alleges is the death of the sole eyewitness which occurred, allegedly, by his own hand.

Time Limitation Between Criminal Act And Indictment Not A Factor Re: Speedy Trial.

The limitations herein are acts of grace by the State Legislature. The Sixth Amendment right to a speedy trial does not attach until the relator-defendant becomes an "accused." *United States vs. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468 (1971); *Dillingham vs. United States*, 423 U.S. 64, 65, 96 S.Ct. 303, 304, 46 L.Ed.2d 205 (1975).

Even considering the entire period (that is from indictment to commencement of trial), there was no impermissible delay under the *Barker* standard. *United States vs. Henry*, 615 F.2d 1223, 1233 (CA9, 1980).

An indictment was filed on February 21, 1978 charging the defendant with aggravated battery. Trial was originally set for August 27, 1979. The defendant moved for a continuance of the trial date. Trial was reset for September 10, 1979. Defense counsel again asked for a continuance and trial was again re-set for November 12, 1979. The defendant asked for a third continuance and trial was again re-set for January 14, 1980.

The First And Only Assertion Of Right To Speedy Trial Was Just Recently Asserted.

The crime charged falls under the limitations upon trial under Louisiana C.Cr.P. Art. 578, subparagraph (2) which allows for commencement of trial no later than two years after the institution of prosecution. However, the defendant's filing of a Motion to Quash suspended the period of limitation established by C.Cr.P. Art. 578, and the State has an additional year from the date of the ruling of the trial court to commence trial. LSA-C.Cr.P. Art. 580; *State vs. Hamilton*, 369 So.2d 1299 (1979).

Of course when the first three factors of the *Barker* balancing test are heavily weighed against the State, the defendant does not have to demonstrate prejudice. *United States vs. Avalos*, 541 F.2d 1100, 1116 (CA5, 1976); *Prince vs. Alabama*, 507 F.2d 693, 706-07 (CA5, 1975); *Hoskins vs. Wainwright*, 485 F.2d 1186, 1192 (CA5, 1973) (on rehearing). This is not such a case, however, as the lion's share of the trial delay should be credited to the Relator. *Hill vs. Wainwright*, 617 F.2d 378, 379 (CA5, 1980).

Rather than "repeatedly and energetically" asserting his rights, as in *United States vs. Vispi*, 545 F.2d 328, 334 (CA2, 1976), Relator waited until immediately before trial to file his Motion to Dismiss on speedy trial grounds. This is not strongly indicative of a desire to

expedite process. *United States vs. McGrath*, 622 F.2d 36, 41 (CA2, 1980).

Specifically, the factors to be considered as to whether or not there has been a denial of a constitutional right to a speedy trial include: (1) length of delay; (2) reasons for delay; (3) resulting prejudice to relator; and, (4) defendant's assertion of his right to speedy trial.

The delay here was lengthy — some 18 months elapsed from indictment to first setting for trial — but is nevertheless considerably shorter than that of other cases in which no Sixth Amendment violation has been found. See, e.g., *Barker vs. Wingo, supra*, 407 U.S. at 533, 92 S.Ct. at 2193 ("well over five years"); *United States vs. DiFrancesco*, 604 F.2d 769, 776 (CA2, 1979) cert. granted, ____ U.S. ____, 100 S.Ct. 1012, 62 L.Ed.2d 751 (1980), ("about 30 months"); *United States vs. Lane*, 561 F.2d 1075 (CA2, 1977) (approximately 58 months).

An indictment was returned February 21, 1978. Arraignment was held in July, 1979. In view of the failure of the defendant to assert his right and in the absence of any showing of prejudice, the State submits there is no merit to defendant-relator's application.

Barker vs. Wingo, 407 U.S. 514 at 525 (1972) specifically sets forth the United States Supreme Court observation in this regard:

> "* * * The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial."

In any event, where the Motion to Quash was first filed on November 8, 1979, the relator himself had waited some 21 months before seeking to expedite the prosecution.

CONCLUSION

Relator did not assert his right to speedy trial until November 8, 1979. Relator failed to demonstrate actual prejudice, that was attributable to the State. Balancing all of the relevant factors, the State submits that there has not been any denial of right to speedy trial that the United States Constitution guarantees the relator, and the application for writ should be denied.

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PROOF OF SERVICE

I hereby certify that three copies of the foregoing have been sent to Garland R. Rolling, Esq., Attorney for Relator, 319 Metairie Road, P.O. Box 9250, Metairie, Louisiana 70055, by placing in the United States mail, postage prepaid this ____ day of November, 1980.

ABBOTT J. REEVES